



Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: ManTech Field Engineering Corporation --
Reconsideration

File: B-245886.5

Date: August 7, 1992

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Fried, Frank, Harris, Shriver & Jacobson, for the protester,
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Department of State, for the agency.
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GAO, participated in the preparation of the decision.

DIGEST

Reconsideration request that seeks modification of remedy reached in prior decision sustaining protest is denied where reconsideration request merely repeats arguments made during protest and record does not otherwise show error of fact or law warranting reversal or modification of the decision.

DECISION

ManTech Field Engineering (ManTech) requests that we modify the recommended remedy in our decision ManTech Field Engineering Corporation, B-245886.4, March 27, 1992, 92-1 CPD ¶ 309, in which we sustained ManTech's protest of the award of a contract to Systems Engineering & Management Associates, Inc. (SEMA) under request for proposals (RFP) No. 0000-125026, issued by the Department of State for engineering and installation services for the Department's worldwide information management system.

We sustained the protest based upon our finding that SEMA proposed in its best and final offer (BAFO) to perform the contract using individuals whom it had no reasonable basis to conclude would be available for performance. We found that, as a consequence of SEMA's failure to ascertain whether its proposed personnel were actually available, the agency had made its determination to award the contract to SEMA based on outdated, inaccurate information. We recommended that the agency reopen negotiations and call for a new round of BAFOs.

On reconsideration, ManTech argues that it offered sufficient evidence of fraud to support a recommendation that State terminate SEMA's contract and issue an award to ManTech. We deny the request for reconsideration.

ManTech argues that the totality of the evidence requires us to find that SEMA's conduct amounted to fraud. It asserts that we ignored "overwhelming evidence" that SEMA made material misrepresentations in its proposal. In its requests for reconsideration, ManTech relies upon the same evidence that it offered in the original protest. Now, as before, we find that evidence and ManTech's arguments to be unpersuasive.

Specifically, ManTech argues that SEMA "engaged in material and repeated misrepresentations concerning the status and availability of its proposed personnel during the procurement, after award of the contract, and during the protest process" that require us to exclude SEMA from further participation in this procurement. In support of this argument, ManTech relies upon several cases in which GAO and other tribunals have recommended termination of a contract and exclusion of the apparent winner from contract award. See Informatics, Inc., 57 Comp. Gen. 217 (1978), 78-1 CPD ¶ 53; accord J.E.T.S., Inc. v. United States, 838 F.2d 1196 (Fed. Cir.), cert. denied, 486 U.S. 1057 (1988); Sterling Federal Systems, Inc., GSBCA No. 10381-P, 90-2 BCA ¶ 22,802, recon. denied, GSBCA No. 10381-P-R, 90-3 BCA ¶ 22,962. In each of these cases, the remedy was based upon a finding that the contractor had knowingly misrepresented the facts with an intent to deceive the agency. In Informatics, GAO found that the awardee intentionally misrepresented that it had conducted a survey of its incumbent employees to determine the number of employees that would be available for work on the contract. Informatics at 11-12. In J.E.T.S., Inc., the Court of Appeals held that the contractor had committed fraud by certifying that it was a small business. 838 F.2d at 1201. In Sterling Federal Systems, the General Services Board of Contract Appeals (GSBCA) found that the intervenor had made an intentional material misrepresentation in its proposal for a cost-plus-award fee contract regarding its actual salaries for the proposed project managers. 90-2 BCA at p. 114,512.

In our initial decision, we found that the "record shows that when SEMA submitted its BAFO, it had no current knowledge regarding the availability of most of the 22 individuals it proposed." Informatics at 3. While we found that SEMA should have taken steps to learn of its proposed staff's availability when it submitted its BAFO, we did not conclude that SEMA deliberately misrepresented the availability of its proposed personnel. We see no reason to

make this finding based on the arguments submitted by ManTech on reconsideration.¹

ManTech asserts, for example, that SEMA knowingly offered the name of one key personnel after being advised by the individual that he was withdrawing permission to use his resume. The record establishes, however, that the individual spoke with someone in SEMA's personnel department who was not involved in preparing SEMA's BAFO, that this employee did not advise those responsible for submitting SEMA's BAFO until after it had been submitted, and that SEMA advised State that the proposed individual was no longer available immediately after the BAFO was submitted. There was no evidence that SEMA prepared its BAFO knowing that the individual had withdrawn his permission and nevertheless used his name to gain an advantage in the procurement.

ManTech also alleges that SEMA engaged in a deceptive technique in that it made salary offers to entice prospective employees to consent to the use of their names in the proposal when SEMA had no intention of actually paying the salaries offered. However, there is no evidence in the record showing that SEMA ever discussed any particular salary range with prospective employees or that it did not intend to ultimately offer what it had promised. The record reveals that only one employee stated that SEMA had discussed a particular salary; the evidence is in conflict whether this witness was later offered a different amount. There was also evidence that other prospective

¹ ManTech also relies upon Electronic Data Systems Federal Corp., GSBGA No. 9869-P, 89-2 BCA ¶ 21,655, recon. denied, GSBGA No. 9869-P-R, 89-2 BCA ¶ 21,778, as support for its argument that the proper remedy is to terminate the contract and disqualify SEMA from the procurement. There, the GSBGA found that the contractor had materially misrepresented its intent to provide the services of the 101 people named in its proposal and that, despite express oral and written promises to the contrary, it fully intended to rely on hiring incumbent personnel. 89-2 BCA at p. 108,937. The Board also found that the agency ignored evidence that should have put it on notice of the contractor's intended "bait and switch." Although, the Board ordered termination of the contract and the possibility of further competition based upon a reconsideration of the agency's requirements, the decision is silent whether the contractor was disqualified from further participation in the procurement. 89-2 BCA at p. 108,938. Thus, it appears that the GSBGA also recognizes that there is some discretion in determining the appropriate remedy even where it is determined that an offer includes a material misrepresentation.

employees were unhappy with the salary that was offered but no evidence that SEMA had promised a different salary previously.

ManTech also asserts that SEMA falsely represented its labor rates for certain categories of labor. The record shows that SEMA stated in its original proposal that its proposed labor rates were based upon its actual experience. In its BAFO, SEMA reduced its rates for several labor categories without amending this representation, particularly with respect to one of SEMA's current employees who was being paid at the rate set out in SEMA's original proposal. Although ManTech concludes that SEMA's failure to make this correction is evidence that SEMA intended to substitute lower paid and less qualified employees after contract award, there is nothing in the record to support this conclusion. In fact, the record shows that SEMA has not attempted to make a substitute for the employee at issue and that he has been performing on the contract since its award. Furthermore, the agency audited the rates included in SEMA's original proposal and was aware of the actual salary being paid to this employee.

Finally, ManTech argues that SEMA's proposal was technically unacceptable and, for this reason, it should have been rejected. This argument was also raised earlier in the protest and we considered it to be without merit. ManTech, 92-1 CPD ¶ 309 at 5 n.3. ManTech's argument on reconsideration does not change our view. Specifically, ManTech asserts that SEMA's proposal was technically unacceptable because it included persons who did not meet the qualification requirements of the RFP. ManTech argues that the agency found that three of SEMA's proposed personnel failed to meet all of the qualifications set forth in the solicitation and that the contracting officer testified that a proposal with only two unqualified personnel would be unacceptable.

The RFP included qualifications which proposed personnel should meet; proposed personnel were measured against these qualification requirements and lower scores awarded for those who did not meet all of the requirements. The record demonstrates that SEMA's proposed personnel were properly evaluated in accordance with this criteria. The solicitation did not provide, as ManTech suggests, that the failure of two proposed personnel to meet the requirements would automatically result in rejection of a proposal.²

² ManTech also argues that SEMA's proposal was technically unacceptable because it contained six unqualified personnel, not three as determined by the technical panel. In reviewing protests concerning the evaluation of proposals,

In sum, ManTech has failed to show that our prior decision contains either errors of fact or law. Accordingly, we deny ManTech's request that we modify our recommended remedy. We deny the request for reconsideration.

for Seymour Efron
James F. Hinchman
General Counsel

it had a reasonable basis. RCA Serv. Co., et al., B-218191 et al., May 22, 1985, 85-1 CPS ¶ 585. The fact that a protester does not agree with the agency's evaluation does not render the evaluation unreasonable. Logistics Servs. Int'l, Inc., B-218570, Aug. 15, 1985, 85-2 CPD ¶ 173. The evaluation panel reviewed the qualifications of the challenged employees and concluded that these three persons were qualified. There is nothing in the record as cited by ManTech to suggest that this conclusion was unreasonable.

Finally, ManTech asserts that SEMA is being allowed to perform with one person who was determined to be unqualified. Whether a contractor actually performs in accordance with the solicitation's requirements is a matter of contract administration that is not reviewable under our bid protest jurisdiction. See Research Management Corporation, B-237865, Apr. 3, 1990, 90-1 CPD ¶ 352.